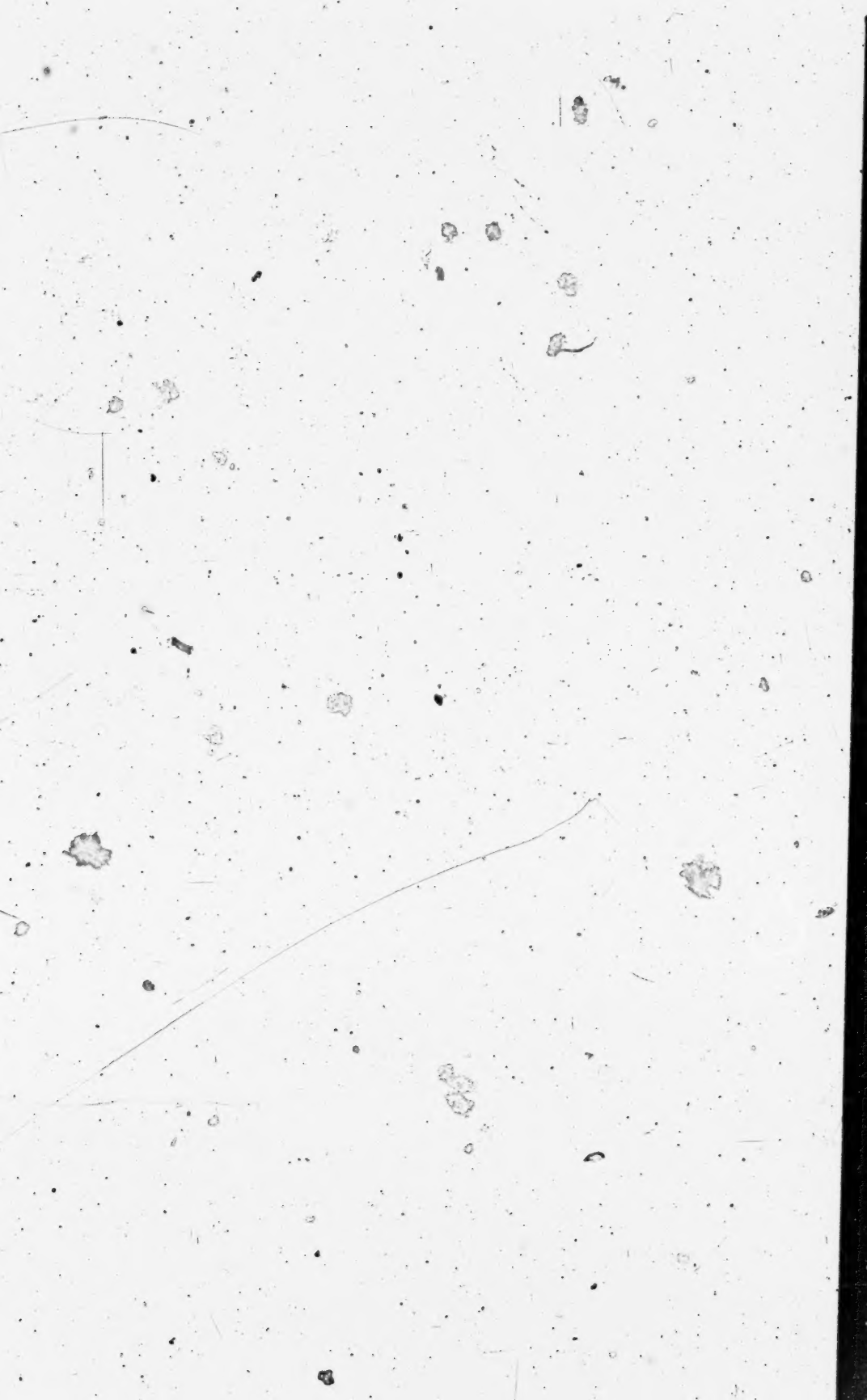

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE PAPER COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case on March 23, 1948.

OPINIONS BELOW

The opinion of the district court (2nd R. 992-1011)[1] is reported at 69 F. Supp. 599. The opinion of the circuit court of appeals (2nd R. 1121) is reported at 167 F. 2d 448.

[1] The record in the original injunction proceeding (No. 336, October Term, 1942) will be cited as "1st R"; the proceedings in the district court immediately following this Court's remand of the case will be cited as "Supp. R"; the record in the present contempt proceeding will be cited as "2nd R."

JURISDICTION

The judgment of the circuit court of appeals was entered on March 23, 1948 (2nd R. 1125). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in a civil contempt action proof of wilful or intentional defiance of the decree is required where compliance is the sole remedy sought, and no penalty or punishment is involved.

2. Whether a judgment enjoining underpayments in violation of the minimum wage and overtime provisions of the Fair Labor Standards Act is unenforceable in a civil contempt action because the trial court did not specifically condemn or refer to the particular unlawful practices resulting in the underpayments proved in the contempt proceeding.

3. Whether in a civil contempt action, upon proof of underpayments in violation of a decree, the Administrator is entitled to an order compelling compliance with the decree by the payment of the wages required thereby.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ

any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * *

"(3) For a workweek longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 15 (a). After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

STATEMENT

This proceeding in civil contempt arises out of the same case which was before this Court over

five years ago *sub nom. Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. The question before this Court at that time was whether the Fair Labor Standards Act applied to respondents' employees in certain of respondents' branch warehouses. Employees in other warehouses were concededly covered, and an injunction had been issued against respondents as to them. This Court's decision slightly enlarged the class of employees covered. The question here is whether respondents, who have continued to violate the law, should be forced in a civil contempt proceeding to comply with the original injunction by paying their employees the amounts which have unlawfully been withheld from them since the original injunction was entered.

A. *Proceedings Prior to Issuance of Injunction*

This action was originally instituted in July 1940 to enjoin respondents from violating the minimum wage, overtime, record-keeping, and "hot goods" provisions of the Fair Labor Standards Act (1st R. 2–21).

At a pre-trial conference, respondents admitted that they were engaged in interstate commerce at the principal office and warehouse in Jacksonville, Florida, and at five of the twelve branches (1st R. 37). They claimed that the other seven branches were engaged exclusively in intrastate commerce (1st R. 38). As to these seven branches respondents admitted that there was no compli-

ance with the Act inasmuch as they did not believe the Act covered the activities there carried on (1st R. 43, 38). At the beginning of the trial, counsel for respondents also admitted that there had been violations, without specifying particulars, at the other admittedly covered offices and branches of their business, but claimed that such violations ceased by April 27, 1940, or a few weeks before suit was filed (1st R. 44–47).

At the trial, the Administrator introduced evidence to establish that respondents were violating the minimum wage and overtime provisions of the Act in various ways at the admittedly covered plants as well as at the so-called "intrastate" branches. The proof that had been presented with respect to violations up to the time of the trial court's determination that the issuance of an injunction was warranted (see pp. 7–8, *infra*) showed the following:

(1) *Piece-workers.* Respondents had failed to comply with either the minimum wage or the overtime provisions of the Act as to piece-workers, respondents' managing partner taking the position that piece-workers were not covered. This treatment of piece-workers continued despite the contrary advice of the Wage and Hour inspector, and apparently despite the advice to respondents from their own attorney that piece rate workers were within the scope of the Act (1st R. 185–187, 576, 577).

(2) *Concealment of overtime hours* by crediting such time to other workers who had not worked the maximum workweek. Under this system, the employees who worked the overtime collected at the straight-time rates from the other employees for the hours credited to the employees who had not worked them (1st R. 182–184, 196).

(3) *Keeping a separate account* and paying employees separately, on so-called "extra labor vouchers," for hours worked in excess of the maximum workweek and not showing such overtime hours on the regular time book (1st R. 189–192, 200–206, 211–212).

(4) *Misclassifying* certain salaried employees as exempt "executive" and "administrative" employees (1st R. 82–103, 120–128, 194). The evidence of the Wage and Hour inspector shows that officials of the Southern Industries plant were advised that they appeared to be misclassifying certain salaried employees who did not meet the requirements of the regulations issued by the Administrator pursuant to the Act. The inspector offered to furnish defendant C. G. McGehee a copy of the regulation and to explain it, but Mr. McGehee turned down the offer with the statement that he was sufficiently familiar with the regulation (1st R. 194).

(5) *The accumulated hours plan.*—Shortly before the institution of this suit in 1940, respondents discharged many of their employees who had been paid flat weekly salaries without additional

compensation for overtime, and then immediately rehired them under a plan by which they received the same compensation as before, purportedly arranged so as to cover both straight time and overtime. (1st R. 315–335, 543–558; 2nd R. 111–139). Although respondents thought the plan lawful under *Walling* v. *Belo Corp.*, 316 U. S. 624 (2nd R. 1000), the court in the contempt proceeding[2] found it illegal because it set up "a completely false and fictitious method of computing compensation without regard to the hours actually worked" (2nd R. 1001), a finding from which respondents have not appealed.

(6) *Section 11 (c) violations* (record-keeping violations).—In addition to respondents' failure to keep any records of the hours of the piece-rate workers (1st R. 182, 197–198), false records were kept with respect to employees whose overtime hours were credited to other employees and employees who were paid by "extra labor vouchers" pursuant to the practices described *supra*.

After hearing the Government's evidence on these matters for almost three days (1st R. 39–335), the trial court stated that in view of the admissions as to violations and the evidence, re-

[2] The plan is described in more detail in the findings of the District Court (2nd R. 999–1001). Extensive testimony as to this practice was presented by both parties at the original trial, both before and after the court shut off evidence as to violations generally (1st R. 315–335, 543–558); the record in the contempt proceeding incorporated a portion of the original record with respect to the plan (2nd R. 111–139).

spondents had not heretofore complied with the statute; the court thereupon directed that further evidence relate to the question whether some of respondents' branches were covered by the Act (1st R. 335–336).[3] At the close of the trial the court held that the employees at the seven disputed branches were not subject to the Act, but concluded from respondents' admissions of violations at the branches concededly in interstate commerce that the statute had been violated and that an injunction should issue as to those branches (1st R. 707–708). The court made no findings as to particular practices at those branches, inasmuch as it had shut off the evidence as to such matters (1st R. 711). An injunction was entered limited to the other establishments, generally restraining violations of *any* of the provisions of the Act and particularly Sections 6 (minimum wage), 7 (overtime), 15 (a) (1) (shipment of "hot goods"), and 11 (c) (record-keeping) (1st R. 712–718).

Both parties appealed to the circuit court of appeals. That court held that some of respondents' employees at the disputed warehouses were engaged in interstate commerce, and that the Administrator was therefore entitled to relief as to them (1st R. 743–745). In addition, the appellate court eliminated from the injunction the

[3] Additional evidence with respect to violation was, however, heard. (1st R. 543–558).

general prohibition against "violating *any* of the provisions" of the Act (1st R. 745). The cause was therefore ordered remanded for the framing of a new decree. On writ of certiorari, this Court held that the activities of some additional employees at the disputed warehouses were in commerce, and affirmed the judgment of the Circuit Court of Appeals as thus modified, stating that "Whether additional evidence must be taken on any phase of the case so that a decree may be drawn is a question for the District Court." 317 U. S. 564, at 572.

Pursuant to the mandate of this Court and the judgment of the circuit court of appeals, the district court without further hearing (2nd R. 994) entered an amended and modified judgment, June 3, 1943 (Supp. R. 3–11). The amended judgment omitted the general injunction against violating *any* of the provisions of the Act. The judgment specifically enjoined respondents, *inter alia*, from paying employees covered by the Act* "less than thirty (30¢) cents an hour, or, after October 23, 1945 * * * less than forty cents (40¢) an hour", except as permitted by orders of the Administrator issued under Section 8 or 14 of the Act, and from employing such employees "for a workweek longer than forty (40) hours unless such employee receives compensation for his em-

*The judgment contained specific provisions as to which employees were covered by the Act (Supp. R. 3–11).

ployment in excess of forty (40) hours in such workweek at a rate not less than one and one-half times the regular rate at which he is employed". (Supp. R. 4–5, 7, 10–11). No appeal was taken from this judgment.

B. *Proceedings in the Contempt Action*

This civil contempt proceeding was instituted by the Administrator in April 1946. The application for an adjudication in civil contempt alleged that respondents had not been complying with the minimum wage, overtime, and record-keeping provisions of the judgment in many respects (2nd R. 1–15). The application prayed that respondents be required to terminate their continuing violations and to "make payment of the amounts of unpaid wages due their affected employees" (2nd R. 14). After trial, the district court found widespread violations of the Act by respondents (1) by misclassifying some twenty employees as exempt "executive" or "administrative" employees, (2) by employing certain piece workers in excess of the maximum workweek without paying them overtime compensation, (3) by excluding from the regular rate of pay of virtually all employees a wage increase granted in the guise of a so-called "bonus," and (4) by applying to numerous employees a "completely false and fictitious method of computing compensation" in the form of an "accumulated hours plan" (2nd

R. 998–1008).[5] Except for the third, these violations were of the same nature, and in some instances concerned the same employees, as were the subject of the trial in the original injunction proceeding (1st R. 82–95, 120–128; 2nd R. 241–259, 267–286).

The District Court nevertheless held that because the prior judgment did not specifically adjudicate the invalidity of the above practices, the court lacked "discretionary power" to punish the defendants for contempt, inasmuch as "to constitute civil contempt there must be some evidence of a wilfull and intentional violation of a Court Order" (2d R. 1010). The finding of absence of wilfullness was seemingly predicated on the conclusion that none of the "specific provisions of the former Judgments prohibiting the doing of any specific thing" had been violated (2d R. 1010–1011).[6] The court furthermore held that it had no power under the statute to allow the administrator to enforce the payment of the unpaid statutory wages in order to enforce compliance with the former judgments, relying on the prior deci-

[5] The Circuit Court of Appeals stated in its opinion that the decree was "in general complied with". (2nd R. 1124.) In view of the proof and findings of widespread violations of the sections of the Act referred to in the decree, the import of this statement is not clear. There was no such finding by the trial court nor does the record support such a finding.

[6] With respect to the accumulated hours plan the court found (2nd R. 1000) that respondents thought their action lawful under *Walling* v. *Belo Corp.*, 316 U. S. 624. The court made no similar finding as to respondents' beliefs with respect to any of the other practices in issue.

sion of the Fifth Circuit in *Walling* v. *Crane*, 158 F. 2d 80.

The court thereupon treated the application for an adjudication in contempt as an amended complaint seeking a broadening of the previous injunction, and entered judgment issuing such an injunction (2d R. 1011–1016).

Both parties appealed.[7] The circuit court of appeals affirmed both the ruling that respondents had violated the Act and the refusal to adjudicate respondents in civil contempt (2d R. 1121–1125).[8]

REASONS FOR GRANTING THE WRIT

The lower courts have not denied that respondents were violating the injunction issued after the decision of this Court in 1943. They held, however, that respondents' conduct could nevertheless not be found in contempt because the violations were not "willful"; by this seemingly was meant that since the unlawful practices committed were not referred to specifically in the judgment and

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[7] Respondents did not challenge the findings that its "accumulated hours plan" was invalid nor that three of its employees had been misclassified as "executives," but did appeal from the other findings of violation.

[8] The court ruled that there was "no need to enquire whether if there had been [contempt] the court could award reparation for unpaid wages as a purging of the contempt," but it granted leave to the Administrator to apply to the district court to seek "retroactive reparation" as an "incident" of the broadened injunction (2nd R. 1125). But cf. the same court's decision in *Walling* v. *Crane*, 158 F. 2d 80, discussed *infra*, p. 23.

had not been explicitly held unlawful by the enjoining court, respondents (though doubtless intending what they were doing) were not aware that such conduct was covered by the injunction.

1. For present purposes, we shall assume the correctness of the lower courts' finding that respondents' unlawful conduct was not a "willful" violation of the injunction. Since respondents knew that they were engaging in precisely the same practices charged by the Administrator to be unlawful at the first trial and that the injunction was in the language of the statute, it is clear, however, that respondents calculatingly risked crossing the line of illegality, whether they meant to violate the injunction or not.

The holding that proof of willful or intentional defiance of a decree is required in a civil contempt action in order to secure simply the remedy of compliance—without any punishment—conflicts with the general rule consistently recognized in the circuit courts of appeals and the district courts and by leading secondary authorities. *Telling* v. *Bellows-Claude Neon Co.*, 77 F. 2d 584, 586 (C. C. A. 6), certiorari denied, 296 U. S. 594; *Proudfit Loose Leaf Co.* v. *Kalamazoo Loose Leaf B. Co.*, 230 Fed. 120, 132 (C. C. A. 6); *Lustgarten* v. *Felt & Tarrant Mfg. Co.*, 92 F. 2d 277, 280 (C. C. A. 3); *Labor Board* v. *Whittier Mills Co.*, 123 F. 2d 725, 727 (C. C. A. 5); *Metallizing Engineering Co.* v. *B. Simon*, 64 F. Supp. 848 (W. D. N. Y.); *Bowers* v. *Pacific Coast Dredging &*

Reclamation Co., 99 Fed. 745, 755 (C. C. N. D. Calif.); *Atlantic Giant Powder Co.* v. *Dittmar Powder Manufacturing Co.*, 9 Fed. 316 (C. C. S. D. N. Y.); *Freeman* v. *Premier Mach. Co.*, 25 F. Supp. 927, 928 (D. Mass.); *Calculagraph Co.* v. *Wilson*, 136 Fed. 196, at 199 (C. C. D. Mass.); *Matthews* v. *Spangenberg*, 15 Fed. 813, 814 (C. C. S. D. N. Y.); 2 High, *Injunctions* (4th ed., 1905) §§ 1416–20; 1 Beach, *Injunctions*, (1895), § 250; Swayzee, *Contempt of Court in Labor Injunction Cases* (1935) pp. 20–21; Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Columbia Law Review 780, 793–5 (1943), and cases cited.

These authorities uniformly recognize that willfulness is a characteristic *distinguishing* criminal from civil contempt, and that while it "may affect the extent of the penalty" to be imposed for civil contempt, the absence of willfulness does "not relieve from liability for a civil contempt" (see *Proudfit* case, *supra*, at 132, 134). "In civil contempt the general rule is that the defendant need not have acted wilfully, and this would seem correct, inasmuch as civil liability for damage done ought not to depend on whether or not the defendant has a 'guilty mind.'" Moskovitz, *supra* at 794–795. As the Fifth Circuit itself has said, in a proceeding "in civil contempt to obtain the benefits of a decree and not one in criminal contempt to hold the respondents guilty of a crime, * * * the question for decision is not one of the intent with which, but simply whether, certain

acts were done." *Whittier Mills Co.* case, *supra* at 727. And in *United States* v. *United Mine Workers*, 330 U. S. 258, this Court recently indicated that willfulness was not an element of civil contempt, saying "The charge in the petition of 'wilfully * * * and deliberately' disobeying the restraining order indicates an intention to prosecute criminal contempt." (330 U. S., at 297n.)

Where, as in the instant proceeding, no penalty or punishment of any kind is sought but only the strictly civil relief of compliance with a duty imposed by the decree and by the law, "the belief, motive, or intent of the defendant not to violate the injunction does not excuse him if in fact his acts resulted in a violation of it." See *Rodgers* v. *Pitt*, 89 Fed. 424, at 429 (C. C. D. Nev.).

The blanket refusal by the courts below to enforce the terms of the decree in the instant case is particularly without justification, since it excused not only practices of possibly doubtful illegality but also practices unquestionably illegal, and which (except as to the bonus plan) respondents knew were claimed to be illegal by the Government when the injunction was issued. There could not have been any reasonable doubt, for example, about the applicability of the Act to piece workers after this Court's decision in January 1945 in *United States* v. *Rosenwasser*, 323 U. S. 360. Yet the record in the contempt proceeding shows that respondents were still under-

paying piece workers and asserting that they were not within the scope of the Act a year and a half after that decision (2nd R. 1007–1008; 244–246, 252, 254–256). Likewise, the findings of the court below (2nd R. 1005–6) show that there was no reasonable ground for respondents to have misclassified their employees as "executives." The evidence that these employees did not meet the prescribed standards to qualify for the exemption was found by the court below to be "so conclusive" as to make it "unnecessary for the Court to summarize the reason for the disqualification of each particular employee" (2nd R. 1006). Similarly, the characterization by the court below of the "accumulated hours plan" as a "completely false and fictitious method of computing compensation without regard to the hours actually worked" (2nd R. 1001), would seem to foreclose the conclusion that there was reasonable doubt as to the illegality of that scheme, particularly after subsequent decisions of this Court.[9] Thus, with the possible exception of the bonus plan, it cannot fairly be said of any of the illegal practices proved in the contempt proceedings that there was reasonable uncertainty of their illegality.

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[9] The decisions in the *Helmerich & Payne*, *Harnischfeger* and *Youngerman-Reynolds* cases, decided November 6, 1944, and June 4, 1945, respectively, made it plain that any false or fictitious or artificial method of computation was invalid. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419.

In any event, whatever reason there might be for reluctance to punish or penalize respondents for unintended violations resulting from an erroneous interpretation of the decree, there is no equitable basis for permitting respondents to breach the injunction without even the risk of having to relinquish to the wronged employees the fruits of their violations. As suggested some years ago by the Seventh Circuit Court of Appeals in a patent infringement case, a defendant who has been enjoined has no "equity" to hew close to the line of disobedience and avoid a citation for contempt when he oversteps the line. *Charles E. Hires Co.* v. *Consumers' Co.*, 100 Fed. 809, 813 (C. C. A. 7); see also *Williams* v. *Mitchell*, 106 Fed. 168, 172 (C. C. A. 7). It has long been recognized that "any person who has been enjoined, who undertakes to see how far he can go or what he may do without crossing the prohibited line, places himself in a dangerous condition, and is always liable to be deemed guilty of contempt; for his own judgment may be so warped by his feelings or necessities that he is liable, even unintentionally, to overstep the legal bounds" (*Rodgers* v. *Pitt*, 89 Fed. 424, at 429 (C. C. D. Nev.)). "It is not proper for a defendant who has been enjoined to experiment with a view of determining how near he may come to a violation of the injunction without actually violating it." 2 High, *Injunctions*, § 1427. There is clearly no justification for relieving such defendant of the

risk of purely civil relief which requires no more than ~~that he bring~~ himself into compliance with the terms of the decree. The consequence of the decision below is to permit the noncomplying employer to retain the advantages accruing from his resolving doubts against compliance, at the expense not only of the public interest in effective enforcement and of employees' rights, but also of complying competitors.

2. In refusing to enforce the decree according to its terms, the decision below conflicts with this Court's decisions reaffirming "the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of an order alleged to have been disobeyed * * *." *Maggio* v. *Zeitz*, 333 U. S. 56, 68–69; *Swift & Co.* v. *United States*, 276 U. S. 311, 327–328; see also *United States* v. *United Mine Workers*, 330 U. S. 258, 293. This aspect of the decision is also contrary to another decision of the Fifth Circuit in the case of *Labor Board* v. *American Mfg. Co.*, 132 F. 2d 740. In holding respondent there in contempt of a decree phrased in much broader and more general terms than the decree here involved, the court said that the contention "that the scope of the decree * * * long since become final, may now be limited *short of its terms*, is wholly without merit, for a decree entered with jurisdiction must be obeyed as entered. * * * Its terms are clear and comprehensive and if they read more broadly than respondent intended that

they should, the time and manner of avoiding that breadth was by objections to the decree before its entry and not by disobedience of it afterwards" (p. 742, italics supplied).

While respondents appealed from the original decree entered in this case, they did not appeal from the decree as modified.[10] Although the trial court at the injunction trial did not rule on the legality of the particular practices here involved, the decree was drafted in terms to enjoin such practices should they prove to be illegal. Respondents were fully aware of the scope of this decree and of the fact that some of the particular practices were claimed to be illegal. They nevertheless did not appeal nor seek to have the decree modified or clarified, but chose to follow their own "private determination of the law." Cf. *United States* v. *United Mine Workers,* 330 U. S., at 293. The decision below excusing respondents' violations under such circumstances tends to "foster experimentation with disobedience" of injunctions (*Maggio* v. *Zeitz,* 333 U. S. at 69) and thus to hamper seriously the effective enforcement not only of the Fair Labor Standards Act but of many other Federal statutes which provide similar enforcement procedures.[11]

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[10] Moreover, even their appeal from the original decree did not challenge its scope, but claimed that no injunction at all should issue because of the claimed cessation of violations (1st R. 737; see also respondents' brief on that appeal, pp. 29–43).

[11] See *Maggio* v. *Zeitz*, 333 U. S. at 68, n. 3.

3. The refusal to enforce the injunction with respect to methods of under-payment not specifically referred to or condemned by the district court has the effect of permitting a defendant to avoid compliance by altering the details of his unlawful scheme or undertaking practices as to which the district court has made no findings. This would mean that the type of injunction which this Court has sustained as properly not restricted to the precise acts found to have been unlawful (*May Department Stores Co.* v. *Labor Board*, 326 U. S. 376, 389–391; *Local 167* v. *United States*, 291 U. S. 293, 299; cf. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426; *Federal Trade Commission* v. *Morton Salt Co.*, 1947 Term, No. 464, decided May 3, 1948 (slip opinion p. 13); *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77) would not achieve its purpose. For in cases in which the sweeping nature of the violations warrants the issuance of a relatively broad injunction to prevent future violation—and the present case clearly comes within that class (see pp. 5–7, *supra*)—the reason for sustaining the broad injunction is to prevent a defendant from continuing his unlawful conduct in a related though somewhat different form.

Here the injunction is not a general one such as were those involved in the Labor Board and Sherman Act cases cited. Although the injunction is in substantially the language of the Fair Labor Standards Act (see pp. 9–10, *supra*), the statu-

tory requirements as to paying a specified sum per hour and time and a half for hours over forty a week are in themselves quite definite. There was thus not the need for making the injunction narrower than the statute that there is in Sherman Act cases. Furthermore, although the object of the injunctions upheld in the cases cited was to prevent defendants from substituting a new unlawful scheme for the one enjoined, here we do not have even that difficult a situation. For three of the four violations found were not merely "similar or fairly related to" respondents' prior unlawful conduct (cf. *Labor Board* v. *Express Publishing Co.*, 312 U. S. at 435); they were exactly the same sort of violation as had been charged at the original trial. Certainly the trial court's conclusion that the admitted violations required an injunction without the necessity for determining the lawfulness of the other practices charged should not render the injunction futile as to such other related practices as were in fact unlawful.

The injunction here involved is the standard form obtained by the Government in substantially all injunction suits brought under the Fair Labor Standards Act, and has been enforced in over a hundred contempt proceedings without challenge.[17] The Seventh Circuit Court of Appeals has rejected the contention that such an injunc-

[17] A substantial number of the cases are listed in note 15, p. 24, *infra*. See also *Walling* v. *Acosta*, 140 F. 2d 892 (C. C. A. 1).

tion "does not advise defendant as to what would constitute a violation," and has characterized the injunction as "clear and definite." *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, 331, certiorari denied, 332 U. S. 855. The decision below, though not holding this form of injunction invalid, appears to preclude its enforcement against conduct not specifically found to have been unlawful prior to the injunction's issuance even as against a defendant manifesting a proclivity toward general disobedience to the Act. Such a refusal to enforce the injunction as it stands would encourage recalcitrant or contentious employers to substitute one scheme of avoiding the statutory requirements for another, and to a large extent increase the difficulties in the way of enforcing the Act. An employer, by shifting from one overtime arrangement to another—all illegal—would never be in contempt but would merely be subject to a new injunction. As the Circuit Court of Appeals for the Second Circuit declared in dealing with a similar situation, an employer might "in this way avoid all accountability for a continued series of such wrongs". "Since the upshot of a new proceeding could be no more than a new injunction, the respondent would never be brought to account for what by hypothesis is contumacy of the existing injunction." *Labor Board* v. *Lowenstein & Sons, Inc.*, 121 F. 2d 673, 674 (C. C. A. 2). See also *Fleming* v. *Tidewater Optical Co.*, 35 F. Supp. 1015, 1017

(E. D. Va.); *Walling* v. *Builders' Veneer & Woodwork Co.*, 45 F. Supp. 808, 811 (E. D. Wis.).

4. While the appellate court below did not find it necessary to rule on the question of the Administrator's right to the remedy of restitution of wages during the period of contempt, this question will necessarily arise if the decision below is reversed on the other issues. But the Fifth Circuit has already held that the Administrator has no authority to obtain such restitution in a civil contempt proceeding (*Walling* v. *Crane*, 158 F. 2d 80),[13] and the district court in this case merely followed that ruling. It is thus appropriate, and we think important, that the question be disposed of by this Court with the other issues in this case rather than remanded to the Fifth Circuit.

In *Porter* v. *Warner Holding Co.*, 328 U. S. 395, this Court held that the power of the Administrator under the Emergency Price Control Act to bring proceedings in equity for the enforcement of that statute included the power to compel restitution of overcharges to customers. The reasoning of this opinion seems applicable to the Fair Labor Standards Act as well. Cf. *Walling* v. *O'Grady*, 146 F. 2d 422 (C. C. A. 2), under the Fair Labor Standards Act.[14] But whether or not

[13] This case is now pending before the Circuit Court of Appeals for the second time on issues similar to those here presented. See 7 W. H. Cases 599, now pending before the Circuit Court of Appeals for the Fifth Circuit, No. 12,335.

[14] See also *Walling* v. *Miller*, 138 F. 2d 629 (C. C. A. 8), certiorari denied, 321 U. S. 784, and *Fleming* v. *Warshawsky*

in an original injunction proceeding the Administrator is entitled to seek restitution of wages previously withheld, we think it clear that after issuance of an injunction a court may order payment of amounts subsequently not paid employees in violation of the injunction. For this is merely to require compliance with the injunction which the statute authorizes, not to give the Administrator a different remedy under the statute. It has been the usual practice of the courts throughout the country to order restitution for violation of injunctions in civil contempt actions under the Fair Labor Standards Act, and no question as to the propriety of this practice has been raised outside of the Fifth Circuit.[15]

& *Co.*, 123 F. 2d 622 (C. C. A. 7), which required restitution under consent decrees.

[15] For example, see *Fleming* v. *Knox*, 42 F. Supp. 948 (S. D. Ga.); *Jacobs* v. *W. B. Coppersmith & Sons*, 1 W. H. Cases 922 (E. D. N. C.); *Walling* v. *Jersey Footwear*, 6 W. H. Cases 552 (D. N. J., 1946); *McComb* v. *Frank Viliari dba Mayaguez Embroidery Co.* (D. P. R.), Civil Action No. 2434, September 12, 1947; *Walling* v. *Empire Steamship Service Corp.* (S. D. N. Y.), Civil Action No. 21–168, May 16, 1947; *Walling* v. *W. H. Gale* (E. D. Va.), Civil Action No. 189, July 15, 1946; *Walling* v. *Charles Bihler* (D. N. J.), Civil Action No. 1276, March 28, 1946; *Walling* v. *Sam Schweitzer et al* (D. P. R.), Civil Action No. 527, March 6, 1946; *Walling* v. *G. & M. Cloak Co.* (E. D. N. Y.), Civil Action No. 26–13, August 6, 1945; *Fleming* v. *G. A. Mercurio Co.* (D. R. I.), Civil Action No. 397, February 12, 1945; *Fleming* v. *Ruth Merzon* (S. D. N. Y.), Civil Action No. 10–77, November 15, 1944; *Fleming* v. *Metro Sportswear, Inc.* (S. D. N. Y.), Civil Action No. 15–143, February 24, 1944; *Fleming* v. *Goldsmith Co.* (D. P. R.), Civil Action No.

The position of the Fifth Circuit in refusing to allow such relief in contempt cases for the period after issuance of the injunction is, we think, *a fortiori*, in conflict with the reasoning of the *Warner* case and of the Second Circuit, neither of which involved violation of a previously issued injunction.

Furthermore refusal to enforce the injunction by requiring the respondents to bring themselves into compliance with it is contrary to the general doctrine that the Government, like other suitors, is entitled to "the full remedial relief" necessary to compel compliance with a judgment in a civil contempt proceeding. *Penfield Co.* v. *Securities and Exchange Commission*, 330 U. S. 585, 592. See also *Parker* v. *United States*, 153 F. 2d 66 (C. C. A. 1); cf. *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 327. Such relief would necessarily include the payment of the wages which the judg-

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686, August 14, 1943; *Walling* v. *Malcolm Kenneth Co.* (D. Mass.), Civil Action No. 1217, March 5, 1943; *Fleming* v. *Daniel Nadal* (D. P. R.), Civil Action No. 527, November 14, 1941; *Fleming* v. *McAdoo* (W. D. Tenn.), Civil Action No. 76, January 20, 1941; *Andrews* v. *Sports-Wear Hosiery Mills, Inc.* (E. D. Pa.), Civil Action No. 217, May 25, 1940; see also *Walling* v. *M. Glasgall Silk Co. & Morris Glasgall* (D. N. J.), Civil Action No. 1256, April 14, 1947, where upon proof of payment of restitution plus liquidated damages, the court dismissed the contempt action. Although these cases involved consent decrees, the power of the Court to order restitution for violations occurring after entry of the decree would be the same whether the decree was entered by consent or after contest.

ment had made it respondents' duty to pay. Any relief less than that would put a premium on violation.

CONCLUSION

The decision below casts serious doubt on the enforceability and usefulness of the hundreds of injunctions obtained under the Fair Labor Standards Act. It is in conflict with principles repeatedly approved by the courts. For these reasons we believe the case sufficiently important to warrant review by this Court, and accordingly respectfully submit that this petition for a writ of certiorari should be granted.

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WILLIAM S. TYSON,
Solicitor of Labor.

JUNE 1948.